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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

STATE OF TEXAS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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69 pp

QUESTION PRESENTED

Whether the Hobbs Act, 28 U.S.C. 2341 *et seq.*, bars litigation of the validity of an agency rule, after the rule has been upheld by another court of appeals and after the statutory 60-day period for seeking judicial review has expired, at the instance of one who knowingly failed to participate in the rulemaking and in the original judicial review of the rules.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Burlington Northern Railroad Company and Southern Pacific Transportation Company participated below as intervenors.

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INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

STATE OF TEXAS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Interstate Commerce Commission and the United States, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The initial opinions of the court of appeals (App., *infra*, 1a-23a) are reported at 730 F.2d 409 and 730 F.2d 420. The amended opinion of the court of appeals (App., *infra*, 24a-29a) is reported at 749 F.2d 1144. The decisions of the Interstate Commerce Commission (App., *infra*, 34a-49a) are not yet reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 32a-33a) was entered on April 23, 1984. A petition for rehearing from the panel's initial opinion was denied on January 7, 1985 (App., *infra*, 29a) when the court of appeals issued an amended opinion. A petition for rehearing of the amended opinion was denied on February 27, 1985 (App., *infra*, 30a-31a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES INVOLVED

Pertinent provisions of the Administrative Orders Review (Hobbs) Act of 1950, 28 U.S.C. 2341 *et seq.*, are set forth at App., *infra*, 50a-56a.

STATEMENT

1. The Administrative Orders Review Act of 1950, 28 U.S.C. 2341 *et seq.*, known as the Hobbs Act, vests jurisdiction to review orders of six federal agencies,[1] including the Interstate Commerce Commission (ICC), in the courts of appeals (28 U.S.C. 2342).[2] The Act also provides that a party aggrieved

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[1] The Federal Communications Commission, the Federal Maritime Commission, the ICC, the Atomic Energy Commission, the Secretary of Agriculture, and the Maritime Administration. In addition to those specified in the statute, orders of several other federal agencies are covered by the judicial review provisions of the Hobbs Act. 8 U.S.C. 1105a(a) (Immigration and Naturalization Service deportation orders), 39 U.S.C. 3628 (Postal Rate Commission orders), 50 U.S.C. 167h(b) (Department of Interior orders), 31 U.S.C. 755 (Personnel Appeals Board of the General Accounting Office orders).

[2] The orders of the Interstate Commerce Commission were, prior to 1975, reviewed by three-judge district courts, with

by a final order by one of the specified agencies "may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. 2344. The agency is directed to "file in the office of the clerk the record on review as provided in section 2112." 28 U.S.C. 2346. The Act then provides as follows, 28 U.S.C. 2349(a):

> The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

2. This case involves rules adopted by the ICC to implement the contract rate provisions of the Staggers Rail Act of 1980, 49 U.S.C. 10713(b).[3] The

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appeals directly to this Court, under the Urgent Deficiencies Appropriations Act of 1913, ch. 32, 38 Stat. 220 *et seq.*, and the Expediting Act of 1903, ch. 544, § 2, 32 Stat. 823. In 1975, Congress amended the Hobbs Act to bring the ICC under that system of judicial review. Pub. L. No. 93-584, 88 Stat. 1917 *et seq.*

[3] The Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 *et seq.*, was the culmination of congressional efforts in the latter half of the 1970's to restore economic vitality to the nation's railroads by generally deregulating rate setting for interstate carriers. Briefly, with respect to interstate rates, carriers were freed to set their own rates without regulation, subject to the requirement that a carrier that dominates a particular traffic market must, if challenged, justify

Commission's rules were adopted in Ex parte No. 387, *Rail Road Transportation Contracts*, 367 I.C.C. 9 (served Nov. 4, 1982) (codified at 49 C.F.R. 1039). Those rules, adopted after notice and comment, were promptly reviewed and upheld (in all respects material to the present case) in *Water Transport Ass'n* v. *ICC*, 722 F.2d 1025 (2d Cir. 1983). The State of Texas did not participate either in the ICC rulemaking or in the judicial review proceedings in the Second Circuit, although it was well aware of the pendency of those proceedings (App., *infra*, 12a-13a).

3. While *Water Transport* was pending in the Second Circuit, a state administrative agency, the Railroad Commission of Texas, rejected certain intrastate rail contract rate tariffs filed by the Burlington Northern (BN) and Southern Pacific (SP) railroads. In each instance, although the tariffs rejected were in full compliance with the ICC's contract rate rules, Texas insisted that it had plenary authority to deviate from the ICC's interpretation and implementation of the Staggers Act. BN and SP each asked

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as reasonable any rate change that goes beyond a degree of rate flexibility automatically sanctioned by the Act. Sections 201-203(a), 49 U.S.C. 10701a, 10707a, 10709(d). In addition, in Section 214(a)-(c)(1) of the Staggers Rail Act, 49 U.S.C. 11501, Congress undertook to restructure the pre-existing system of dual federal and state regulation of intrastate rates. Section 214(a)-(c)(1) preempts state authority to regulate adjustments in intrastate rates that are an integral part of general regional or national rate increases, inflation-based increases, or fuel cost adjustment surcharges. 49 U.S.C. 11501(b)(6). Other intrastate rate adjustments may be regulated by any state that wishes to exercise such authority, provided that the state's standards and procedures are certified by the ICC to conform to those of the Interstate Commerce Act. 49 U.S.C. 11501(b)(1)-(3) and (4)(A).

the ICC to review the Texas Commission rulings pursuant to 49 U.S.C. 11501(c). The ICC reversed the Texas decisions as to both contract tariffs and admonished the state to follow the federal contract rate rules. Texas then petitioned for review under the Hobbs Act in the Fifth Circuit, now many months after the Ex parte No. 387 rules had been issued.[4] Prior to the consolidated oral argument of the *Texas* cases in the Fifth Circuit, the Second Circuit issued its decision in *Water Transport Ass'n.* The ICC and the United States then argued in the Fifth Circuit that the court lacked jurisdiction to review the substantive validity of the Ex parte No. 387 contract rate rules because the Hobbs Act limits a court's jurisdiction to petitions filed within 60 days of issuance of an ICC order, and because the Second Circuit had exclusive jurisdiction to review the validity of the ICC rules.[5] The federal parties acknowledged, however, that jurisdiction did exist to entertain one of the issues Texas raised—whether the ICC contract rate rules were "federal standards" binding on the states under 49 U.S.C. 11501.

4. The Fifth Circuit rejected the government's jurisdictional objection. It held (App., *infra*, 11a) that the Hobbs Act affords jurisdiction to review de novo the "substantive validity" of the ICC's 1982

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[4] The Commission's rules were served on November 4, 1982. Texas filed its petition for review in the BN case on May 19, 1983, and in the SP case on September 7, 1983.

[5] Texas argued that the Commission's contract rate regulations were invalid ab initio because they rested upon an erroneous interpretation of 49 U.S.C. 10713. These very arguments had been presented to, and rejected by, the Second Circuit in the *Water Transport* case. See 722 F.2d at 1030-1032.

contract rate rules. The court further found that the 60-day time limit for Hobbs Act review (28 U.S.C. 2344) bars only attacks on "the *procedure* by which the contract rate rules were adopted." App., *infra*, 10a (emphasis added). The court asserted jurisdiction to review the rules a second time for "validity," even though "Texas clearly had notice that the ICC contract rate rules would apply to intrastate * * * commerce before those rules became final" and even though Texas "failed to participate in the rulemaking proceedings [and failed] to seek intervention or file an amicus brief in [the] Second Circuit." App., *infra*, 12a-13a. The court then proceeded to affirm the "validity" of the Ex parte No. 387 rules, replowing the same ground covered by the Second Circuit: "[w]e agree with the rationale of [*Water Transport Ass'n*], and need not lengthen this opinion by reiterating its discussion. Instead we summarize its holding." App., *infra*, 15a.[6]

5. The ICC and the United States petitioned for rehearing solely of the panel's jurisdictional holding. In denying rehearing, the panel amended the portion of its earlier opinion dealing with Hobbs Act jurisdiction (App., *infra*, 24a-29a), principally by replacing the words "substantive validity" with "statutory authority." Thus, the court adhered to its view that the Hobbs Act barred Texas only "from attacking the procedure by which the contract rate rules were adopted"; the state was free to challenge the "statutory authority" for the rules. App., *infra*, 25a.

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[6] In a brief separate opinion, the panel applied its rulings in the BN appeal to the SP appeal (App., *infra*, 22a-23a). Hence, the two cases are identical for purposes of the jurisdictional issues raised here.

REASONS FOR GRANTING THE PETITION

The question presented for review in this case is similar to that presented in the government's petition in *ICC* v. *Tri-State Motor Co.*, No. 84-1515 (filed Mar. 25, 1985).[7] In both cases, the decisions below incorrectly expand the jurisdiction of the courts of appeals by disrupting the repose and centralized review procedure the Hobbs Act was designed to provide. Unless these decisions are reversed, they will result in substantial and wholly unnecessary burdens on the courts, the Hobbs Act agencies, and numerous other agencies with comparable review statutes.

Because this case and *Tri-State* arise in somewhat different factual contexts, we believe it would be appropriate for this Court to grant both petitions so that the ramifications of the important questions presented may be more fully explored. *Tri-State* involves parties who filed repetitive, identical challenges to an agency policy in one court of appeals after another. *Texas* involves a party that has chosen to forgo participation in the administrative proceedings and in the judicial review prescribed by the Hobbs Act, and instead simply fails to comply with agency rules. Then, in a subsequent proceeding arising from the application of those rules, the party seeks to revive issues that it could and should have raised earlier.[8]

Both fact patterns are not uncommon and the pendency of the two cases together provides an opportu-

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[7] A copy of our petition in that case has been served on respondents.

[8] As noted above, Texas also raised another issue over which the court of appeals did have jurisdiction; the state contended that the Commission's contract rate rules were not "federal standards" under 49 U.S.C. 11501. The court rejected this contention on the merits. App., *infra*, 16a-19a.

nity for the Court to examine the important administrative law questions at issue in a more varied set of circumstances than either case alone presents.

CONCLUSION

The petition for a writ of certiorari should be granted. The court may wish to consolidate this case with *ICC* v. *Tri-State*, No. 84-1515, or to hear the cases in tandem.

Respectfully submitted.

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MAY 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 83-4318

STATE OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

April 23, 1984

Before RUBIN, JOHNSON and DAVIS, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The State of Texas challenges the ICC requirement that it approve a tariff for intrastate contract carriage of wheat by rail that does not disclose the rate to be charged. Texas contends that the rate is an essential term of the contract and that disclosure of such an essential term is required by statute. It also seeks review of the ICC order putting the tariff into effect on various other grounds. We conclude that the ICC order was valid, and deny review.

I.

Burlington Northern Railroad Company filed with the Texas Railroad Commission and with the Inter-

state Commerce Commission a contract rate tariff for transporting wheat from origins in Texas, Kansas, and Oklahoma to Sherman, Texas. The Railroad Commission had jurisdiction over the Texas intrastate shipments while the ICC had jurisdiction over the interstate movements. The filing consisted of two documents, a contract summary and the complete contract. The summary, which is made available to the public under ICC rules, did not disclose all of the terms of the contract. It did not, for example, disclose the exact rates to be charged because the contract contained provisions for an allowance or discount to shippers based on annual volume and it disclosed neither the annual volume requirement nor the amount of the discount.[1] The contract contained, of course, the full terms of Burlington's agreement with the shippers, but this document was confidential. The ICC had adopted a regulation permitting the omission of this information from summaries for both intrastate and interstate shipments.[2]

The Railroad Commission routed the Burlington Northern tariff to its Rail Rate Board, a staff level group, which examines rate filings to determine whether they satisfy the Railroad Commission's requirements. The Rate Board rejected the contract

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[1] The contract summary disclosed only the minimum annual volume requirement. Burlington Northern claims that the contract itself contains no further volume requirement.

[2] 49 C.F.R. § 1300.313 (1983). The ICC regulations require disclosure of the existence of a discount, but not of the amount. *Id.* § 1300.313(a)(7). The contract itself may be inspected by parties who challenge the contract and who demonstrate that they are "likely to succeed on the merits" of their complaints. *Id.* § 1300.310(b).

summary in a letter because the Interstate Commerce Act requires the summary to include all "essential terms of the contract," [3] and the Rate Board considered the omitted information "essential." Texas contends that the Act requires a railroad to file three documents, not two: the contract itself, a contract summary, and a contract tariff. Texas contends that the essential terms of the contract, which include full information about the origin and destination of movements, their nature, and the actual rates to be charged, must be disclosed in the contract tariff.

Burlington sought reconsideration of the Rate Board decision by the Railroad Commission, but its petition has not been acted on. It also filed a petition with the ICC seeking reversal of the Railroad Commission decision in accordance with the procedure prescribed by statute,[4] which authorizes any railroad subject to ICC jurisdiction to seek ICC review of "the decision of any State authority . . . on the grounds that the standards and procedures applied by the State were not in accordance with the provisions of" the Act. The ICC decided that it had jurisdiction to review the rejection of Burlington's contract summary even though the Texas decision had been made by the Rate Board and not by the Railroad Commission. It reasoned that the Act gives it jurisdiction to review the "decision" of "any" state authority, the Rate Board's action was a "decision," and the Board is a state authority. The ICC next decided that it would not follow its usual practice and require Burlington to exhaust state administrative remedies. Finally the ICC decided that Burlington's contract summary complied with federal standards. It then au-

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[3] 49 U.S.C. § 10713(b) (Supp. V 1981).

[4] 49 U.S.C. § 11501(c) (Supp. V 1981).

thorized Burlington to put the proposed contract into effect. The State of Texas seeks judicial review of that order.

Texas asserts that the ICC had no jurisdiction to review the Rate Board's refusal to approve the Burlington tariff. If it had jurisdiction, Texas argues, the ICC is wrong in permitting a railroad to file a tariff that does not disclose the actual rates to be charged, for these are essential terms of the contract whose disclosure is required by the Act. Even if the ICC has read the Act correctly in regard to Interstate rail contracts, Texas contends its reading is not binding on state authorities regulating intrastate rail traffic.

II.

Until 1980 state regulatory bodies had initial responsibility for regulation of intrastate rail transportation. The ICC had power to preempt a state's authority and to prescribe an intrastate rate in only two situations: (1) when the rate unjustly discriminated against or imposed an undue burden on interstate commerce; or (2) when the state was dilatory in acting on a proposed rate charge.[5] Concerned about the "financial plight of the railroad industry," [6] Congress determined that government regulation had "severely handicapped [railroads] in their ability to compete with other modes of transportation." [7] Congress decided to reduce repetitive and conflicting state regula-

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[5] *See* 49 U.S.C. § 13(4), (5) (1976) (current version at 49 U.S.C. § 11501(a) (Supp. V 1981)).

[6] H.R. Rep. No. 1035, 96th Cong., 2d Sess. 34, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 3979.

[7] *Id.* at 38, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 3983.

tion, which is perceived to be a major contributor to the railroad industry's difficulties.[8] In the Staggers Rail Act of 1980,[9] therefore, Congress adopted a new rail transportation policy designed to reduce government regulation of the industry and to allow rail carriers to earn "adequate revenues." [10]

As part of its new transportation policy, Congress directed the ICC both "to cooperate with the States on transportation matters" and also "to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in" the Act.[11] The Act alters state jurisdiction in three interrelated ways.[12] It preempts all state jurisdiction over general rate increases.[13] It also prohibits a state from exercising any jurisdiction over intrastate rail transportation provided by an interstate rail carrier unless the state authority "exercises such jurisdiction exclusively in accordance with the provisions of" the Act.[14] The Act preempts all state regulation unless the ICC certifies that state standards and procedures are in accordance with the Act, and an uncertified state authority may not exercise any jurisdiction over in-

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[8] *Id.* at 128, 130, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 4072, 4074.

[9] Pub. L. No. 96-448, 94 Stat. 1895 (1980) (codified in scattered sections of 11, 45, and 49 U.S.C.).

[10] 49 U.S.C. § 10101a(3) (Supp. V 1981).

[11] *Id.* § 10101a(9).

[12] *Id.* § 11501(b), (c).

[13] 49 U.S.C. § 11501(b)(6). This originated as Section 214 of the Staggers Act.

[14] *Id.* § 11501(b)(1).

trastate rates.[15] In addition, any carrier providing interstate transportation regulated by the ICC may petition the ICC "to review the decision of any State authority, in any administrative proceeding in which, the lawfulness of an intrastate rate, classification, rule, or practice is determined, on the grounds that the standards and procedures applied by the State were not in accordance with the provisions of" the Act.[16] The Commission must render a final decision on such a petition within thirty days, and "[i]f the Commission determines that the standards and procedures were not in accordance with the provisions of" the Act, "its order shall determine and authorize the carrier to establish the appropriate rate, classification, rule, or practice." [17]

The Staggers Act also permits rail carriers, like other businesses, to conduct their operations by contract.[18] The use of contracts was intended to be "a

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[15] *Id.* § 11501(b)(3)(A), (b)(4)(A). The Railroad Commission has been certified provisionally. Congress and the Commission had contemplated that the state certification process would take only 90 days. *Id.* § 11501(b)(3)(A). The Commission states that it and Congress underestimated the difficulties of ensuring that the standards and procedures of the many interested states were in accordance with federal law. Rather than revoke the jurisdiction of state authorities over intrastate rail rates at the end of the 90-day period, the Commission "provisionally certified" all states requesting certification to give them time to bring their standards into compliance. This included Texas. Ex parte 388, State Intrastate Rail Rate Authority, 46 Fed. Reg. 23,335 (April 24, 1981). The Railroad Commission still operates under this provisional certification.

[16] 49 U.S.C. § 11501(c) (Supp. V 1981).

[17] *Id.*

[18] *Id.* § 10713.

significant aspect of the new freedom allowed to carriers to market rail transportation more effectively." [19] The Burlington contract was entered into under this provision.

III.

Texas argues that the ICC lacked power to review the rejection of Burlington's contract both because no "decision" has been issued and the action was not taken by a "state authority."

The Rate Board's letter decision was effective in preventing fulfillment of the proposed contract. It was binding on Burlington and the shippers. It was taken after deliberation. The Rate Board not only stated that in its view Burlington's tariff was defective, it refused to publish that tariff. Moreover, in imperative language, the Board ordered Burlington "to notify all subscribers served with the above-referenced filing that the proposed rates will not take effect as proposed and are not legally chargeable rates." The Rate Board itself labeled its written ruling a "first-level decision." While the label it chose to attach is not decisive, the written ruling was literally a "decision" by any definition of that term.

Next, Texas emphasizes that the Railroad Rate Board, not the Railroad Commission itself, rejected the tariff. It contends that only the Railroad Commission may be considered a "state authority." [20]

As the Commission noted in its opinion the term "state authority" as used in the Act is inclusive. It is modified by the word "any" and thus refers not only to the state agency with final authority to act,

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[19] H. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 100, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4110, 4132.

[20] 49 U.S.C. § 11501(c) (Supp. V 1981).

"but to any unit of that agency that makes decisions attributable to" the state[21] that have the effect of refusing to approve a contract. Any other construction of the term "state authority" might permit a state to circumvent the ICC's jurisdiction simply by delegating its powers to a staff level body and then asserting that only its staff, and not the agency itself, had acted. Congress clearly did not intend that result.

In its letter decision, the Rate Board advised Burlington that "[t]he decision of the Board in this matter is subject to both administrative appeal at the Division level and the filing of a Motion for Reconsideration with the Commission." Burlington filed a motion for reconsideration with the Rate Board and, at the same time, filed its petition with the ICC complaining that the state's action was contrary to the standards of federal law. The Railroad Commission stayed its reconsideration of the Burlington contract application pending ICC determination of Burlington's petition to it and has yet to act on the motion.

The Rate Board letter ruling was not a final decision. But ICC review is not limited by the Act to final decisions. The ICC stated in its opinion that it generally requires railroads to exhaust their remedies before state agencies, if the state's procedures are consistent with federal procedures. Nothing in the Act, however, exacts such exhaustion as a prerequisite to ICC review.

The ICC found that in this case postponement of a decision pending exhaustion of state administrative remedies "would serve no useful purpose."[22] Given

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[21] Burlington Northern R.R., ICC Decision No. 39174, at 2 (Apr. 25, 1983).

[22] *Id.*

the Railroad Commission's strenuous arguments on the merits, and its own contract rules, the ICC saw "little likelihood of RCT reversing the [Rate Board's] decision." [23]

The ICC also recognized that any postponement of a decision on Burlington's petition would be inconsistent with the Act, which allows the ICC only sixty days in which to approve or disapprove rail contracts [24] and consequently imposes this requirement as a federal standard on state regulatory agencies.

Finally, as the ICC found, the Railroad Commission had stayed its own administrative proceedings, which would have mooted this jurisdictional controversy, pending the ICC's action. This had "the appearance of deferring to [the ICCs] . . . judgement [sic]." [25]

The ICC asserts that the Railroad Commission itself had rejected a contract tariff of the Atchison, Topeka, and Santa Fe Railway Company on the same grounds at issue here. Moreover, Burlington and the ICC contend, the full Railroad Commission has since continued to reject railroad contract tariffs on the same grounds, forcing the ICC repeatedly to overrule its actions. Texas has not challenged these assertions. Indeed, on June 6, 1983, the Railroad Commission rejected a contract summary filed by Southern Pacific on the grounds that it did not adequately disclose rates, origins, or destinations. Predictably, the ICC overruled the Railroad Commission, and the state's petition for review has become a companion

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[23] *Id.*

[24] 49 U.S.C. § 10713(e) (Supp. V 1981).

[25] *Burlington Northern R.R.*, ICC Decision No. 39174, at 2 (Apr. 25, 1983).

case to this one. *Texas v. United States*, 730 F.2d 420 (5th Cir. 1984).

Burlington need not be required to make futile efforts to exhaust remedies or to await action that is so clearly forecast. Texas has not persuaded us that the ICC was wrong in deciding to review the action of the Rate Board.

IV.

The ICC's contract rate rules were not adopted in this proceeding but in Ex Parte 387, Railroad Transportation Contracts, 367 I.C.C. 9 (1982). The ICC contends that, insofar as the Railroad Commission's petition is an attack on the validity of the rules themselves, it comes too late and we lack jurisdiction to entertain it. Texas concedes that a direct attack on Ex parte 387 is now barred, but argues that we have jurisdiction to review the policy underlying the rules in the context of their application to the Burlington contract.

The Administrative Orders Review Act of 1950, known as the Hobbs Act, provides that a party aggrieved by a rule, regulation, or final order of the ICC must file a petition for judicial review within sixty days. 28 U.S.C. §§ 2342, 2344 (1976 & Supp. V 1981). This limitation is jurisdictional and cannot be judicially altered or expanded.[26]

Texas is now barred from attacking the procedure by which the contract rate rules were adopted. *See Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595 (D.C.Cir. 1981). The crux of the state's challenge, however, is to the

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[26] *Illinois Central Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983); *Chem-Haulers, Inc. v. United States*, 536 F.2d 610, 613-14 (5th Cir. 1976).

substantive validity of the rules. When an agency applies a previously adopted rule in a particular case, the Hobbs Act does not bar judicial review of the substance of the rule, even, if more than sixty days have elapsed since its issuance. *See id.* at 602; *Geller v. FCC*, 610 F.2d 973, 978 (D.C. Cir. 1979) (per curiam); *Network Project v. FCC*, 511 F.2d 786, 789 n.1 (D.C. Cir. 1975). As the District of Columbia Circuit observed, in allowing an attack on FCC rules three years after their promulgation:

> As applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further commission action applying it. For unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.[27]

The ICC argues that review of the rule "as applied" must be limited to an examination of whether "the adjudicated facts conform to the rule and whether the rule should be waived or applied in that particular instance." *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974). *Pacific Gas*, however, discusses the extent of review of a rule in

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[27] *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813, 80 S.Ct. 50, 4 L.Ed.2d 60 (1959).

subsequent *administrative* proceedings. The ICC has cited no case indicating that such a restrictive standard applies to judicial review of an agency rule when later sought to be applied to a particular situation. Indeed, the cases suggest the opposite. Texas is not limited to an attempt to demonstrate special circumstances that qualify or alter application of the rule of the Burlington contract.

The ICC complains understandably about the state's dilatoriness in pursuing this petition for review. Notwithstanding its protestations to the contrary, Texas clearly had notice that the ICC contract rate rules would apply to intrastate as well as interstate commerce before those rules became final. Although the ICC's initial notice of interim contract rules was ambiguous in this regard,[28] Texas received ample warning that the rules under consideration might be so applied.[29] Despite this warning, Texas

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[28] The ICC's notice of interim contract rules, published on November 5, 1980, certainly did not say that the proposed rules would apply to intrastate movements. *See* 45 Fed. Reg. 73,381 (1980) (to be codified at 49 C.F.R. §§ 1039, 1300).

[29] The rules became final on November 4, 1982. On February 8, 1982, in its provisional certification of the Texas Railroad Commission, the ICC had informed Texas that its procedures required "excessive disclosure of contract rates." Ex parte 388, State Intrastate Rail Rate Authority (Feb. 8, 1982). On August 5, 1982, the ICC had cautioned states that had filed responses to the February 8 decision, including Texas, that they should "pattern their contract rules on those developed thus far by the Interstate Commerce Commission in Ex parte No. 387," and warned that, since the Ex parte 387 proceeding was not then complete, the states would be expected to alter their regulations, if necessary, in order to comply with the final results reached in that proceeding.

failed to participate in the rulemaking proceedings.[30] Texas also failed to seek intervention or file an amicus brief in a Second Circuit case directly reviewing the contract rate rules.[31] It has been suggested that "those who have had the opportunity to challenge general rules should not later be heard to complain of their invalidity on grounds fully known to them at the time of issuance." [32] Nevertheless, the Hobbs Act does not bar review of the underlying policy of a rule on these grounds.[33] We, therefore, have jurisdiction to consider the Railroad Commission's challenge to the substantive validity of the rules adopted in Ex parte 387.

State Intrastate Rail Rate Authority, 365 I.C.C. 855, 856 (1982). This was sufficient to remedy any defect in the original Ex parte 387 notice.

[30] ICC regulations provides that "[a]ny person may participate in rulemaking proceedings by submitting written information or views." 49 C.F.R. § 1110.4 (1983). Even assuming that Texas was misled by the original notice and could not have filed comments by the deadline specified, December 22, 1980, it could have sought to file a late comment during the almost two-year pendency of the rulemaking proceeding. *See id.* § 1110.6.

[31] *Water Transport Association v. ICC*, 722 F.2d 1025 (2d Cir. 1983). *See* 28 U.S.C. §§ 2323, 2348 (1976); Fed. R. App. P. 29.

[32] *Outward Continental N. Pac. Freight Conference v. Federal Maritime Comm'n*, 385 F.2d 981, 982-83 n. 3 (D.C. Cir. 1967).

[33] The District of Columbia Circuit has allowed a party who had filed objections during a rulemaking proceeding, but who had failed to petition for judicial review of the rulemaking proceeding itself, to attack the substantive validity of the rule when it was applied in subsequent proceedings. *Network Project v. FCC*, 511 F.2d 786 (D.C. Cir. 1975).

V.

Texas contends that the ICC misconstrued its statutory mandate when it required the filing of two documents rather than three, and when it decided that the Staggers Act did not require public disclosure of contract rates.

In concluding that actual contract rates should not be disclosed to the general public, the ICC balanced two congressional directives. On the one hand, the Act mandates that a contract summary should contain "such nonconfidential information as the Commission prescribes." 49 U.S.C. § 10713(b) (Supp. V 1981). The clear implication of this language is that certain contract terms are to remain undisclosed to the general public. On the other hand, this same provision directs the ICC to "assure that the essential terms of the contract are available to the general public in tariff format." *Id.* The ICC, therefore, was required to determine which terms were both essential and nonconfidential, making them subject to public disclosure.

Whether the statute contemplates the filing of two or three documents is not clear from its terms.[34] Whether two or three pieces of paper are filed is immaterial, provided that the "essential terms" of the contract are somehow made public. The ICC's interpretation of the statute to require only two filings is within its authority.[35]

The validity of the rules adopted in Ex parte 387 has been sustained by the Second Circuit in *Water Transport Association v. ICC*, 722 F.2d 1025 (2d

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[34] 49 U.S.C. § 10713.

[35] *Water Transport Association v. ICC*, 722 F.2d 1025, 1032 (2d Cir. 1983).

Cir. 1983).[36] We agree with the rationale of that case, and need not lengthen this opinion by reiterating its discussion. Instead we summarize its holding.

The statutory language does not define what contract terms are "essential" and the legislative history does not elucidate the term.[37] What is essential must be determined in the light of the structure and purpose of the Staggers Act, not by prior uses of the phrase "essential terms" or contract law definitions. The legislative purpose of disclosuse is to provide information sufficient for the exercise of their rights to parties who have standing to contest the contract.[38] The ICC has balanced the need for confidentiality with the rights of parties to challenge contracts. The ICC rules do not manifestly vary from the statutory requirements.

Texas argues that the Second Circuit ignored legislative history demonstrating congressional intent to require disclosure of contract rates. It cites a statement in the Conference Report accompanying the Act to the effect that rail carriers who enter into

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[36] The Second Circuit considered the ICC rules on disclosure at both the "first tier" (disclosure of "essential terms" to the general public) and the "second tier" (disclosure of additional contract terms to parties with standing to challenge particular contracts). The court upheld the validity of the ICC's first-tier rules, but remanded the second tier rules with instructions that the ICC make discovery easier for parties with standing to challenge contracts. *Water Transport Association*, 722 F.2d at 1032. The state's challenge here is limited to the ICC's first-tier rules.

[37] *Water Transport Association*, 722 F.2d at 1031, and authorities cited therein.

[38] *See supra* note 2. Shippers and ports are given standing to challenge rail contracts under 49 U.S.C. § 10713(d) (Supp. V 1981).

contracts under the Act are "both common carriers and contract carriers." [39] Texas interprets this to mean that a railroad is a common carrier until its contract is approved by the ICC, and a contract carrier only thereafter. Like the ICC, we read the passage differently: it means that railroads are common carriers when they serve all comers at a general, publicly disclosed rate, and contract carriers when they enter into private contracts authorized by the Act. The latter interpretation of the statute is well within the ICC's discretion.

The document to which the public has access may not contain confidential carrier-shipper terms. The ICC determination that the price the shipper pays for the transport of its goods is confidential and need not be disclosed is one that, considering its expertise, it is better qualified to make than a federal court.[40]

VI.

Even if the ICC's construction of the phrase "essential terms" was within the Commission's discretion, Texas contends, the ICC's interpretation is not binding on Texas because it is simply an agency rule rather than an explicit provision of the Staggers Act.

The Staggers Act provides that state authorities may exercise jurisdiction over intrastate transportation only if they do so "exclusively in accordance with the provisions of this subtitle." 49 U.S.C. § 11501(b)(1) (Supp. V 1981). Texas argues that

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[39] H. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 100, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4110, 4132.

[40] *See, e.g., FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 102 S.Ct. 38, 44, 70 L.Ed.2d 23, 33 (1981); *Western Coal Traffic League v. United States*, 719 F.2d 772, 778 (5th Cir. 1983) (en banc).

"the provisions of this subtitle" are limited to explicit provisions of the Staggers Act itself and do not include rules and regulations promulgated by the ICC. Because the Act itself does not exempt contract rates from disclosure, Texas, asserts, the states themselves are free to interpret the general provisions of the Act requiring disclosure of "essential" contract terms.

Two circuits have now rejected similar arguments. In *Illinois Central Gulf R.R. v. ICC*, 702 F.2d 111, 115 (7th Cir. 1983), the Seventh Circuit held that "consistent rulings of the ICC must necessarily be incorporated and adhered to by state commissions exercising jurisdiction pursuant to the Staggers Act." Texas seeks to distinguish *Illinois Central Gulf* on the grounds that a long-standing ICC policy was at issue, rather than a recently adopted rule such as the one involved here.[41] But the Third Circuit has held that ICC standards and procedures recently promulgated to implement general terms of the Staggers Act are incorporated into that Act and thus binding on state authorities. *Wheeling-Pittsburgh Steel Corp. v. ICC*, 723 F.2d 346 (3d Cir. 1983).

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[41] The ICC argues, persuasively, that despite the relative youth of its contract rate rules, there is even more reason to incorporate them into the Act than the series of rulings at issue in *Illinois Central Gulf*. Whereas those rulings could be overruled by the ICC if the change in policy were adequately explained, *NLRB v. Haberman Constr. Co.*, 618 F.2d 288, 309 n. 22 (5th Cir. 1980), *modified*, 641 F.2d 351 (5th Cir. 1981) (en banc), the contract rate rules can be overturned or modified only after the ICC conducts a new informal rulemaking proceeding with notice and an opportunity for public comment. *Consumer Energy Council v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982), *aff'd mem.*, —— U.S. ——, 103 S.Ct. 3556, 77 L.Ed.2d 1402 (1983).

The Third Circuit's interpretation is supported by legislative history and by the language of the Act itself. The Conference Committee Report accompanying the Act indicates that Congress intended to "ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals." H. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 106, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4110, 4138. Furthermore, the Act itself requires the ICC to promulgate rules "to assure that the essential terms of the contract are available to the general public in tariff format." 49 U.S.C. § 10713(b) (Supp. V 1981).

If each state were free to define for itself what contract terms are "essential" and subject to disclosure, the congressional goal of federal uniformity would be undermined. The contract at issue in this case, for example, governs movements of wheat from origins both within and without Texas to destinations in Texas. If Texas were free to mandate disclosure of rates with respect to the commerce within Texas, over which it has jurisdiction, it would be a simple matter to extrapolate the rates applying to the interstate commerce, over which the ICC has exclusive jurisdiction. If Congress contemplated such inconsistencies between state and federal policies, it surely would not have conferred upon the ICC authority to determine whether state standards and procedures are in accordance with federal law. 49 U.S.C. § 11501(c) (Supp. V 1981).

Texas contends that our assessment of whether Congress intended to preempt state rules in this area should be colored by an awareness of the limitations on federal power imposed by the commerce clause and

the tenth amendment. Preemption of state power by implication, Texas contends, is not favored. But congressional intent to preempt state authority could not be much more explicit than it is in this instance. As we have noted, Congress preempted all state jurisdiction over general rate increases and prohibited a state from exercising any jurisdiction over intrastate rail transportation unless it does so "exclusively in accordance with the provisions" of the Act, as determined by the ICC. That Congress did not explicitly mandate the confidentiality of contract rates does not contravene other clear evidence of legislative intent to preempt general state authority over disclosure of contract terms, when such authority is inconsistent with federal standards.[42]

Finally, Texas asserts that the ICC has defaulted on its responsibility to provide clear standards for the states, rendering its initial, provisional certification of the Texas Railroad Commission invalid. Until the ICC initially certifies a state authority, the state standards and procedures in effect on the effective date of the Act "shall be deemed to be certified" by the ICC. 49 U.S.C. § 11501(b)(3)(B) (Supp. V 1981). Texas contends, therefore, that the Railroad Commission standards and procedures that were previously in effect should be "deemed certified." In support of this argument, Texas relies on *Kentucky Utilities Co. v. ICC*, 721 F.2d 537 (6th Cir. 1983). *Ken-*

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[42] Texas also challenges the Staggers Act as unconstitutional under the commerce clause and the tenth amendment. That contention has been rejected by another panel of this circuit. *Texas v. United States*, 730 F.2d 420 (5th Cir. 1984). A facial challenge to the Staggers Act must, in any event, originate in a district court, not in a court of appeals. 28 U.S.C. §§ 1331, 1337 (1976 & Supp. V 1981).

tucky Utilities, however, is of limited relevance to the instant case. The Sixth Circuit found that the ICC had circulated to the states a series of interim guidelines instead of providing a single clear standard for ratemaking, obligating the states to "apply any new rate theory currently in vogue at the ICC." 721 F.2d at 544. In this case, the ICC rules on rate disclosure were final on November 4, 1982, and by that time it was clear that the ICC meant them to be binding on state authorities. The Rail Rate Board determination that Burlington's contract was defective was issued on March 9, 1983, long after the ICC had provided the states with clear guidance on rate disclosure. Furthermore, even if the ICC's provisional certification of Texas were invalidated,[43] the ICC would still have jurisdiction to determine whether the state's standards were "in accordance with the provisions of this subtitle." 49 U.S.C. § 11501(c) (Supp. V 1981).

VII.

Among the goals of the Staggers Act were those of establishing uniform federal regulation of railroad traffic and of allowing rail carriers to emulate, at least to some degree, the contractual relationships of unregulated businesses. In the light of these legislative goals, the ICC rules allowing contract rail carriers and shippers to maintain the confidentiality of contract rates are well within its discretion to interpret the statutory phrase, "essential terms of the contract." Adopted in accordance with the Staggers Act,

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[43] The Seventh Circuit has held that the ICC's decision to certify state authorities conditionally was a valid exercise of its discretion. *Illinois Central Gulf R.R. v. ICC*, 720 F.2d 958 (7th Cir. 1983). *See also supra* note 15.

these rules are themselves a part of the federal law, and state authorities exercising jurisdiction over intrastate commerce conducted by interstate carriers must exercise such jurisdiction only in accordance with them. The Texas rules mandating disclosure of actual rates are fundamentally inconsistent with the ICC rules allowing confidentiality. The petition of the State of Texas for review is, therefore, DENIED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 83-4542

STATE OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

April 23, 1984

Before RUBIN, JOHNSON and DAVIS, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Southern Pacific Transportation Company filed an amendment to a contract for transporting limestone within the State of Texas with the Texas Railroad Commission. It also filed a contract summary containing the information required by the ICC rules. The contract summary, which is available to the public, did not disclose the exact rates charged by Southern Pacific or the origin and destination of all movements. The contract contained the full terms of Southern Pacific's agreement with the limestone shippers, but this document was confidential. The Railroad Commission rejected the contract summary because it did not include all "essential terms of the

contract," [1] basing its action on the same interpretation of the Act adopted by the state's Rail Rate Board in a case involving a contract filed by Burlington Northern Railroad Company, decided by us today. *State of Texas v. United States*, 730 F.2d 409 (5th Cir. 1984) (*Burlington Northern*).

Southern Pacific filed a petition with the ICC seeking reversal of the Railroad Commission decision, in accordance with the statutory procedure.[2] The ICC granted Southern Pacific's petition, finding that the Railroad Commission's rejection violated federal standards and procedures. Texas then sought judicial review.

Texas challenges the ICC action on essentially the same grounds considered by us in Parts V and VI of our opinion in *Burlington Northern*. It also challenges the ICC's exclusion of origins and destinations from the "essential terms" required to be included in the contract summary.

The ICC asserts that we lack jurisdiction over this petition insofar as it challenges the substantive validity of the ICC's contract rate rules. We rejected this contention in Part IV of *Burlington Northern*.

While, therefore, we take jurisdiction of this petition, for the reasons stated in *Burlington Northern*, we DENY it.

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[1] 49 U.S.C. § 10713(b) (Supp. V 1981).

[2] 49 U.S.C. § 11501(c) (Supp. V 1981).

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 83-4318, 83-4542

STATE OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Jan. 7, 1985

Before RUBIN, JOHNSON, and DAVIS, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Having fully considered the application for rehearing en banc filed jointly by Interstate Commerce Commission and the United States, the court withdraws Part IV of its prior opinion, reported at 730 F.2d 409 (5th Cir. 1984), and substitutes for it the following:

IV.

The ICC's contract rate rules were not adopted in this proceeding but in *Ex parte 387, Railroad*

Transportation Contracts, 367 I.C.C. 9 (1982). The ICC contends that, insofar as the Railroad Commission's petition is an attack on the validity of the rules themselves, it comes too late and we lack jurisdiction to entertain it. Texas concedes that a direct attack on Ex parte 387 is now barred, but argues that we have jurisdiction to review the rules as they apply to the Burlington contract and to review whether the rules are authorized by the statute.

The Administrative Orders Review Act of 1950, known as the Hobbs Act, provides that a party aggrieved by a rule, regulation, or final order of the ICC must file a petition for judicial review within sixty days. 28 U.S.C. §§ 2342, 2344 (1976 & Supp. V 1981). This limitation is jurisdictional and cannot be judicially altered or expanded.[26]

Texas is now barred from attacking the procedure by which the contract rate rules were adopted. *See Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595 (D.C. Cir. 1981). The crux of the state's challenge, however, is to the ICC's statutory authority to adopt such rules and to the rules as they apply in this case. When an agensy applies a previously adopted rule in a particular case, the Hobbs Act sixty-day limit does not bar later judicial review of the substantive statutory authority for their enactment or of their applicability to a particular situation. *See id.* at 602; *Geller v. FCC*, 610 F.2d 973, 978 (D.C. Cir. 1979) (per curiam); *Network Project v. FCC*, 511 F.2d 786, 789 n.1 (D.C. Cir. 1975). As the District of Columbia Circuit ob-

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[26] *Illinois Central Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983); *Chem-Haulers, Inc. v. United States*, 536 F.2d 610, 613-14 (5th Cir. 1976).

served, in allowing an attack on FCC rules three years after their promulgation:

> As applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before the court for review of further Commission action applying it. For unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.[27]

The ICC argues that review of the rule "as applied" must be limited to an examination of whether "the adjudicated facts conform to the rule and whether the rule should be waived or applied in that particular instance." *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974). *Pacific Gas*, however, discusses the extent of review of a rule in subsequent *administrative* proceedings. The ICC has cited no case indicating that such a restrictive standard applies to judicial review of an agency rule when later sought to be applied to a particular situation. Indeed, the cases suggest the opposite, especially when the contention is that the rule lacks statutory authorization.[28] Texas is not limited to an attempt

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[27] *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813, 80 S.Ct. 50, 4 L.Ed.2d 60 (1959).

[28] *See, e.g., Natural Resources Defense Council*, 666 F.2d at 602 (citing *Functional Music, Inc.*, as an example); *cf.*

to demonstrate special circumstances that qualify or alter application of the rule to the Burlington contract.

The ICC complains understandably about the state's dilatoriness in pursuing this petition for review. Notwithstanding its protestations to the contrary, Texas clearly had notice that the ICC contract rate rules would apply to intrastate as well as interstate commerce before those rules became final. Although the ICC's initial notice of interim contract rules was ambiguous in this regard,[28a] Texas received ample warning that the rules under consideration might be so applied.[29] Despite this warning, Texas

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Illinois Central Gulf R.R., 720 F.2d at 961 (*Functional Music* and *Geller* teach that the statutory time limit on judicial review cannot cut off forever all review of administrative decisions); *Alabama Ass'n of Ins. Agents*, 533 F.2d 224, 236 (5th Cir. 1976) (noting, in a non-Hobbs Act case, that "considerations of finality notwithstanding, our duty to see that the Congressional mandate . . . is carried out in individual cases that come before us requires review" of the regulation in question).

[28a] The ICC's notice of interim contract rules, published on November 5, 1980, certainly did not say that the proposed rules would apply to intrastate movements. *See* 45 Fed. Reg. 73,381 (1980) (to be codified at 49 C.F.R. §§ 1039, 1300).

[29] The rules became final on November 4, 1982. On February 8, 1982, in its provisional certification of the Texas Railroad Commission, the ICC had informed Texas that its procedures required "excessive disclosure of contract rates." *Ex parte 388, State Intrastate Rail Rate Authority* (Feb. 8, 1982). On August 5, 1982, the ICC had cautioned states that had filed responses to the February 8 decision, including Texas, that they should "pattern their contract rules on those developed thus far by the Interstate Commerce Commission in *Ex parte No. 387*," and warned that, since the *Ex parte 387* proceeding was not then complete, the states would be expected to alter their regulations, if necessary, in order to

failed to participate in the rulemaking proceedings.[30] Texas also failed to seek intervention or file an amicus brief in a Second Circuit case directly reviewing the contract rate rules.[31] It has been suggested that "those who have had the opportunity to challenge general rules should not later be heard to complain of their invalidity on grounds fully known to them at the time of issuance."[32] Nevertheless, the Hobbs Act does not always bar review of a rule on these grounds.[33] We, therefore, have jurisdiction to consider the Railroad Commission's challenge to the statutory authorization for the rules adopted in *Ex*

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comply with the final results reached in that proceeding. State Intrastate Rail Rate Authority, 365 I.C.C. 855, 856 (1982). This was sufficient to remedy any defect in the original *Ex parte 387* notice.

[30] ICC regulations provide that "[a]ny person may participate in rulemaking proceedings by submitting written information or views." 49 C.F.R. § 1110.4 (1983). Even assuming that Texas was misled by the original notice and could not have filed comments by the deadline specified, December 22, 1980, it could have sought to file a late comment during the almost two-year pendency of the rulemaking proceeding. *See id.* § 1110.6.

[31] *Water Transport Association v. ICC,* 722 F.2d 1025 (2d Cir. 1983). *See* 28 U.S.C. §§ 2323, 2348 (1976); Fed. R. App. P. 29.

[32] *Outward Continental N. Pac. Freight Conference v. Federal Maritime Comm'n,* 385 F.2d 981, 982-83 n. 3 (D.C. Cir. 1967).

[33] The district of Columbia Circuit has allowed a party who had filed objections during a rulemaking proceeding, but who had failed to petition for judicial review of the rulemaking proceeding itself, to attack the substantive validity of the rule when it was applied in subsequent proceedings. *Network Project v. FCC,* 511 F.2d 786 (D.C. Cir. 1975).

parte 387 and to the application of those rules in this particular case.

This change does not alter the result reached. Therefore, the application for rehearing is denied. Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor judge in regular active service of this Court having requested that the court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-4318, 83-4542

STATE OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

Petition for Review or an Order of the
Interstate Commerce Commission

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

[February 27, 1985]

Before RUBIN, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of

Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Alvin B. Rubin
United States Circuit Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-4542

ICC No. 39387

STATE OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

Petition for Review or an Order of the
Interstate Commerce Commission

[Filed Apr. 23, 1984]

JUDGMENT

Before RUBIN, JOHNSON and DAVIS, Circuit Judges.

This cause came on to be heard on the petition of the State of Texas for review of an order of the Interstate Commerce Commission, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that peti-

tion for review of an order of the Interstate Commerce Commission in this cause be, and the same is hereby denied;

IT IS FURTHER ORDERED that petitioner pay to respondents and intervenor-respondent, the costs on appeal to be taxed by the Clerk of this Court.

April 23, 1984

A true copy

Test: Gilbert P. Ganucheau
Clerk, U.S. Court of Appeals,
Fifth Circuit

/s/ By Sarah L. Holmes
Deputy
New Orleans, Louisiana
March 12, 1985

Issued as Mandate: Jan. 17, 1985

Reissued as Mandate: March 12, 1985

APPENDIX E

INTERSTATE COMMERCE COMMISSION

DECISION

No. 39174

PETITION OF BURLINGTON NORTHERN RAILROAD COMPANY FOR REVIEW OF A DECISION OF RAILROAD COMMISSION OF TEXAS RAIL RATE BOARD PURSUANT TO 49 U.S.C. 11501

Decided: April 21, 1983

[Filed Apr. 25, 1983]

Burlington Northern Railroad Company (BN) petitions under 49 U.S.C. § 11501(c) for review of a decision of the Rail Rate Board (RRB) of the Railroad Commission of Texas (RCT). The RRB rejected a contract rate tariff (contract summary) and Supplement 1 to the tariff on the grounds that they did not include all essential terms of the contract as required by 49 U.S.C. § 10713 and 16 TAC § 5.558 (RCT 051.03.30.008). RRB states that the contract rate tariff did not set forth the annual volume or rate allowance provisions of the contract.

BN argues that the tariff rejection violated the Federal standards and procedures that are binding on RCT's regulation of intrastate commerce. It requests that we assume jurisdiction over and approve the intrastate portion of the contract. Petitioner also seeks a protective order. RCT replied.

RRB's decision was headed "Notice of Defective Rate Filing" but states that it was a "first-level decision", subject both to administrative appeal at the staff level (by the Director of the Transportation Division) and at the RTC level. A favorable ruling by RTC would make the "Notice" void *ab initio*. Petitioner has taken the latter course of action. BN has appealed to RTC and filed the instant petition due to the time sensitivity of the contract and shipper's need to commence operations as soon as possible to avoid being harmed competitively. Petitioner argues that if it is forced to exhaust its administrative remedies in the State of Texas, the strict time limits of 49 U.S.C. § 10713 for review of contracts will be circumvented. RCT has stayed consideration of the railroad's motion for reconsideration pending our decision on the matter.

JURISDICTION

RRB is a staff level body which examines incoming rate filings to determine if they contain the required elements. RCT argues that RRB is not a decision-making body, that its determinations are not agency decisions, and that only an RCT order disposing of a motion for reconsideration of the Board's determination would be an agency decision appealable to this Commission. RCT points to the language of 49 U.S.C. 11501(c) referring to "the decision of any state authority" and cites some legislative his-

tory of that section for the proposition that "state authority" may denote only the State agency itself, not its staff. Although RCT is aware of Commission decisions ruling that exhaustion of administrative remedies under State law is not invariably a prerequisite to relief under section 10501,[1] RCT considers them inapplicable to this petition because they did not deal with attempts to seek Commission review after only staff level determinations had been made. Even if this kind of review were permissible, RCT argues that petitioner has failed to justify the need for such extraordinary relief.

This case seems to present an issue of first impression, because we have not passed on state decisions issued at such an initial level. In addition, the unique facts of this case bear upon our decision on the jurisdictional question. For example, we believe that railroads should generally exhaust their remedies before state agencies, if the state's procedures are consistent with federal procedures. Here, however, as we explain below, exhaustion would serve no useful purpose.

"State authority" is used in 49 U.S.C. 11501(c) as an inclusive term and, since it is modified by the word "any", refers not only to a State agency but to any unit of that agency that makes decisions attributable to RCT. Nothing in the legislative history cited by RCT conflicts with this logical interpre-

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[1] No. 39060, *Petition of the Denver and Rio Grande Western Railroad Company and Salt Lake, Garfield and Western Railway of Utah Pursuant to 49 U.S.C. 11501* (not printed), served March 2, 1983; No. 38686 *Petition of Great Western Railway Company for Review of Order of Colorado Public Utilities Commission* (not printed), served November 30, 1981.

tation. Similarly, "decision" is not a term which should be construed rigidly. The notice of defective filing actually referred to itself as a "first-level *decision*" (emphasis added). It has the force of State law unless overturned at a higher agency level, is appealable within the RCT, and likewise may be appealed to this Commission. Moreover, the language of section 11501(c) speaks only in terms of a "decision"; and, as RCT recognizes, we have previously construed this not to require a railroad to exhaust its administrative remedies at the state level before soliciting our review.

Postponement of a decision here, as suggested by RCT, would result in delay with BN waiting for further State action and then perhaps appealing this same matter to us. Further, we do not foresee much likelihood of RCT reversing the RRB's decision. Based on RCT's strenuous argument in this case, and the rules RRB follows, we consider the probability of RCT reversing RRB at best remote. Further, RCT's stay of its action (which it claims would have been completed in 10-17 days of March 21, 1983, and possibly mooted this proceeding), has the appearance of deferring to our judgment. We conclude that jurisdiction exists under 49 U.S.C. 11501(c) to hear this appeal.[2]

The specific standards for this case were adopted inferentially by the Commission accepting BN's contract, and the exact contract summary.

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[2] In addition, our consideration of the petition is consistent with 49 U.S.C. 10713(e), which requires this Commission to approve rail service contracts within 60 days of their filing and evinces an intent on the part of Congress that consideration of such contracts not be subject to protracted delays.

PETITIONER'S SUBMISSION AND THE FEDERAL STANDARD ISSUE

The generally applicable Federal standards for contracts were adopted by us in Ex Parte No. 387, *Railroad Transportation Contracts*, 367 I.C.C. 9 (1982).

RRB stated that the tariff failed to set forth the annual volume provisions of the contract. Contract summaries are required to identify only the minimum annual volume. *See* 49 C.F.R. 1300.313(a)(6). Item 30 of the Contract Summary in question states:

> This contract applies in connection with rail rates published in tariffs lawfully on file with the ICC subject to minimum volume of 75,000 tons.

Item 30-A of Supplement 1 to the Contract Summary states:

> This contract applies in connection with rail rates published in Tariff ICC BN 4019-Series, RCT A-57, which tariff is lawfully on file with the ICC and RCT, subject to minimum volume of 75,000 tons.

On their face, the documents tendered for filing comply with Federal annual volume requirements. They were accepted by this agency. As explained below, the State may require no more onerous requirements. Moreover, petitioner claims that the contract itself contains no further volume requirement.

RRB also faulted the tariff for failing to set forth the rate allowance provision of the contract. Contract summaries are required to identify the "existence", but not the terms or amount, of special features. *See* 49 C.F.R. 1300.313(a)(7). The require-

ment was so limited in recognition of the need for confidentiality in private contractual agreements, while permitting public disclosure of essential terms. Ex Parte No. 387, *supra* at 32-34. Item 35 of the Contract Summary in question is headed: SPECIAL FEATURES, and states simply: Allowance. While its terms remain undisclosed, the special feature is identified, and the tariff in this respect also complies with Federal requirements. The documents containing their terms were also accepted at the Federal level.

RCT argues, however, that the legislative history of section 10713 reveals a Congressional intention to encourage use of contracts to stimulate rail investments, a goal which would not be furthered by making contract terms secret. It claims that no public policy embodied in the Interstate Commerce Act would be served by treating volume allowance provisions as confidential, and that in fact their disclosure would promote competition. This argument is merely a collateral attack on the decision in Ex Parte No. 387, *supra* at 31-34, where we found that proper implementation of section 10713 warrants a certain amount of confidentiality in railroad transportation contracts, and our final rules were drafted accordingly.

RCT also takes the position that it is not obligated to conform to these regulations. It contends that rules adopted by this Commission are not automatically applicable to the States, because section 11501 requires the States to regulate "in accordance with the provisions of this Subtitle," i.e. the Interstate Commerce Act, not necessarily in accordance with regulations adopted to implement the statute. RCT also argues that it has never been accorded the "full hearing" required by section 11501(f) as a condition

precedent to Commission action under section 11501.[3] However, its argument is to the effect that RCT is not bound by our rules in Ex Parte No. 387 because they were adopted without adjudicatory hearing under section 11501(f). It does not claim that it has been denied a proper hearing on the instant petition.

We have previously taken the position that the language of section 11501 may encompass our regulations, and we see no reason to depart from that position. In Ex Parte No. 388, *State Intrastate Rail Rate Authority — P.L. 96-448*, served February 8, 1982, we extended the provisional certification of Texas and other States as having standards and procedures permitting then to exercise jurisdiction over intrastate railroad transportation in accordance with Federal law. That decision permitted States to determine the level of regulation they would engage in, so long as the Federal scheme of regulation is regarded as the maximum level which could be imposed on intrastate rail operations. To aid States in attemping to bring their practices into conformance with Federal standards, the decision set forth guidelines and contained an appendix listing several problem areas, including a specific admonition that in regard to section 10713, contract rates could not be made subject to broad disclosures.

Subsequently, in Ex Parte No. 388, *State Intrastate Rail Rate Authority — P.L. 96-448*, 365 I.C.C. 855, 856 (1982), we tentatively concluded that Illinois had met the certification requirements and noted that, while Illinois had adopted our interim and pro-

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[3] Section 11501(e) which RCT cites was redesignated as section 11501(f) in section 17(a)(1) of the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102, 1117 (September 20, 1982).

posed rules on contracts, it was cautioned that differences in our final regulations would necessitate changes in its approach to intrastate rail regulation. In a subsequent decision on the Illinois certificate request in Ex Parte No. 388, *State Intrastate Rail Rate Authority — P.L. 96-448*, 367 I.C.C. 149, 150-152 (1982), we directed Illinois to make the changes necessary to conform to our final contract rate rules. It clearly has been our policy to require State conformance with Commission regulations where those regulations have been promulgated to give effect to the purposes of the Staggers Act.

The rigid meaning RCT gives to the phrase "in accordance with the provisions of this subtitle" has recently been reviewed. The United States Court of Appeals for the Seventh Circuit found that 49 U.S.C. § 11501(b)(1) requires that consistent rulings of the I.C.C. must necessarily be incorporated and adhered to by state commissions exercising jurisdiction pursuant to the Staggers Act". *Illinos Central Gulf Railroad Company v. I.C.C.* No. 82-1046 slip op. at 7-8 (7th Cir. Mar. 14, 1983). Hence, the court found that a policy of the Commission had to be considered a "rule" requiring conformity by a State agency. A fortiori, the regulations adopted through informal rulemaking are also binding on the States. This puts to rest RCT's allegations under section 11501(f).

It is clear that BN's submissions comply with Federal standards. Although RRB apparently applied the RCT's regulations, Texas may not impose stricter standards or procedures than those at the Federal level. See No. 38936, *Fort Worth and Denver Railway Company — Petition for Review Pursuant to 49 U.S.C. 11501(c)* (not printed), served November 8, 1982. In Ex Parte No. 388 *supra* at 8, we dis-

cussed the procedural submission of Texas in detail and specified certain elements of Texas procedure that were inconsistent with Federal law. Specifically we stated that:

> In its submission, Texas also requires excessive disclosure of contract rates. Its insistence that every term which would affect the economic or monetary cost of rail transportation must be disclosed could destroy the confidentiality of contracts and chill negotiations between carriers and shippers, contrary to 49 U.S.C. § 10713. The essential terms should be related to and limited by the relevant standards of lawfulness.

Thus, this is not an area of nonconformance which Texas may profess ignorance. RCT has had adequate notice that its practices are not consistent with Federal standards and procedures. In view of the many cases requiring the States to follow procedures which are not in derrogation of Federal procedures, at least for the major goals of the Staggers Act such as contracts, we cannot find in this instance that Texas is regulating intrastate rates in conformity with its provisional certification. *Cf.* No. 38936 *supra.*

Motion for Protective Order

Petitioner requests a protective order which would prevent any release or publication of the contents of the contract it submitted along with the motion and petition. However, the contract itself is not germane to the issues here. Our only concern is with the contract tariff which is a matter of public information. Consequently, we are directing the staff to sever the contract from the petition and return the original and all copies to the railroad. There is thus no record

of the contract in our files other than the corresponding document for interstate transportation, which is protected under our rules, 49 C.F.R. 1300.310. RCT has assured us that it will not release the contract. In the circumstances, the request will be dismissed as moot.

We take this opportunity to request that parties submitting confidential material for which a protective order is sought do so by furnishing the documents in a separate package marked "confidential material subject to request for protective order." Physical segregation and clear labeling are essential for an agency which handles a large volume of material, most of which is of public record. Our clerical personnel need clear warning of sensitive documents and an easy manner of assuring that they are not inadvertently exposed to public scrutiny. In addition, segregation allows easy return of confidential matter which is not crucial to the decisional process. In the last resort, complete return of the these materials is the best guarantee of secrecy.

Relief

Under 49 [U.]S.C. 11501(c), if we find that the State's standards and procedures are not in accordance with the provisions of the Interstate Commerce Act, the Commission is directed to determine, and authorize a carrier to establish, the appropriate rate. We find that the RCT's rejection of the contract tariff violated Federal standards and procedures binding upon the RCT in its regulation of intrastate commerce. There being no other issue of the lawfulness of the contract itself and no disapproval of the contract under the standards of section 10713 of the act or similar State authority, we authorize petitioner to place its proposed contract in effect.

This decision does not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request for relief is granted. Burlington Northern Railroad Company is authorized to put the proposed contract into effect.
2. The motion for protective order, involving the contract, is dismissed as moot.
3. This decision is effective on the date of service.
4. This proceeding is discontinued.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison. Vice Chairman Sterrett did not participate.

[SEAL]

AGATHA L. MERGENOVICH
Secretary

APPENDIX F

INTERSTATE COMMERCE COMMISSION

DECISION

No. 39387

PETITION OF SOUTHERN PACIFIC TRANSPORTATION COMPANY UNDER 49 U.S.C. 11501 FOR REVIEW OF A DECISION OF THE RAILROAD COMMISSION OF TEXAS

Decided: July 21, 1983

[Filed July 25, 1983]

Southern Pacific Transportation Company (SP), on June 23, 1983,[1] petitioned the Commission to review an order by the Railroad Commission of Texas (RCT) rejecting SP's filing of an intrastate rail transportation contract supplement. RCT found that SP's summary accompanying the supplement did not disclose

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[1] An incomplete petition was received on June 17, 1983, without environmental or energy conservation statements. Those statements were received June 23, 1983, thereby perfecting the petition at that time. *See* No. 38905, *Burlington Northern Railroad Company* v. *Public Utilities Commission of the State of Colorado* (not printed), served October 25, 1982.

the origin and destination stations or the rates under the contract. It concluded that the filing therefore did not conform to Federal standards under 49 U.S.C. 10713 requiring disclosure of essential terms of the contract.

We find that RCT's rejection violated Federal standards and procedures, and under 49 U.S.C. 11501 we authorize SP to file with RCT the contract amendment, with the accompanying supplemental summary, and to place it into effect.

The amendment in question is the second one to Contract No. RCT-SP-C-0118, already on file with the RCT, for transportation of limestone. The supplemental contract summary, unlike that of the first supplement accepted and filed with RCT, does not disclose any origins, destinations, or base rates. It simply states, "SUPPLEMENTAL AGREEMENT ISSUED, RESULTING IN CHANGES ONLY TO THE CONFIDENTIAL MATERIAL NAMED IN CONTRACT."

This supplemental summary is adequate disclosure under our final rules governing the filing of contracts, 49 C.F.R. 1300.313(b). At the time the first supplement was filed, the Commission's interim rules required origins, destinations, and rates to be disclosed. Ex Parte No. 387, *Rail Transportation Contracts*, 45 Fed. Reg. 73,481, November 5, 1980. Our final rules no longer require origins, destinations, and rates to be disclosed except for transportation to ports or for agricultural commodities, forest products, or paper. *Rail Transportation Contracts*, 387 ICC 9 (1982). We note that although the summary SP filed with RCT does not comply with the *format* requirements of our final rules this error is inconsequential, since the supplement changes only terms that are confiden-

tial.[2] Moreover, RCT did not rely on this factor in rejecting the document.

RCT's order rejecting SP's supplement essentially admits that SP's document complies with our final rules; however, RCT states that our final rules are contrary to 49 U.S.C. 10713. RCT contends that origins, destinations, and charges are essential terms that must under the statute be disclosed. RCT further argues that section 11501(f)[3] requires the Commission to hold a full hearing on this matter, that the Commission has not yet held a full hearing, that an RCT decision contrary to the Commission's contract rules is therefore not bound by those rules, and that such a decision by RCT is not merely a collateral attack on the Commission's decision implementing those rules. We have previously considered and rejected similar arguments in No. 39174, *Petition of Burlington Northern Railroad Company for Review of a Decision of Railroad Commission of Texas Rail Rate Board Pursuant to 49 U.S.C. 11501* (not printed), served April 25, 1983. The views expressed there apply with equal vigor to the instant case. Accordingly, and in light of our final rules governing transportation contracts, we conclude that RCT's rejection was unlawful.

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[2] The rule regarding format, 49 C.F.R. 1300.313(d), provides:

> The contract summary and supplements shall enumerate and have each item completed. Where the item does not pertain to the contract or amendment, the term "not applicable" ("NA") shall be used.

[3] Section 11501(e) which RCT cites was redesignated as section 11501(f) in section 17(a)(1) of the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102, 1117 (September 20, 1982).

Motion for Protective Order

Petitioner requests a protective order which would prevent any release or publication of the contents of the contract and the amendments thereto it submitted along with the motion and petition. However, the contract itself and the amendments are not germane to the issues here. Our only concern is with the contract summary (tariff) and the supplements thereto which are a matter of public information. Consequently, we are directing the staff to sever the contract from the petition and return the original and all copies to the railroad. In the circumstances, the request will be dismissed as moot.

We take this opportunity to again request that parties submitting confidential material for which a protective order is sought do so by furnishing the documents in a separate package marked "confidential material subject to request for protective order." Physical segregation and clear labeling are essential for an agency which handles a large volume of material, most of which is of public record. Our clerical personnel need clear warning of sensitive documents and an easy manner of assuring that they are not inadvertently exposed to public scrutiny. In addition, segregation allows easy return of confidential matter which is not crucial to the decisional process. In the last report, complete return of these materials is the best guarantee of secrecy.

Relief

Under 49 U.S.C. 11501(c), if we find that the State's standards and procedures are not in accordance with the provisions of the Interstate Commerce Act, the Commission is directed to determine, and authorize a carrier to establish, the appropriate rate.

We find that the RCT's rejection of the supplement to the contract summary and the amendment to the contract violated Federal standards and procedures binding upon the RCT in its regulation of intrastate commerce. There being no other issue of the lawfulness of the contract amendment itself and no disapproval of the contract amendment under the standards of section 10713 of the act or similar State authority, we authorize petitioner to place its proposed contract amendment into effect.

This decision does not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request for relief is granted. Petitioner is authorized to put the proposed contract into effect.
2. The motion for protective order, involving the contract and the amendments thereto, is dismissed as moot.
3. This decision is effective on the date of service.
4. This proceeding is discontinued.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

AGATHA L. MERGENOVICH
Secretary

[SEAL]

APPENDIX G

28 U.S.C. 2341

CHAPTER 158—ORDERS OF FEDERAL AGENCIES; REVIEW

Definitions

As used in this chapter—

(1) "clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) "petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

(3) "agency" means—

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, the Interstate Commerce Commission, or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture; and

(C) the Administration, when the order was entered by the Maritime Administration.

28 U.S.C. 2342

Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42; and

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11190(i)(2) of title 49, United States States Code.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. 2343

Venue

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

28 U.S.C. 2344

Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules.

Any party aggrieved by the final order may within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;
(2) the facts on which venue is based;
(3) the grounds on which relief is sought; and
(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

28 U.S.C. 2345

Prehearing conference

The court of appeals may hold a prehearing conference or direct a judge of the court to hold a prehearing conference.

28 U.S.C. 2346

Certification of record on review

Unless the proceeding has been terminated on a motion to dismiss the petition, the agency shall file in the office of the clerk the record on review as provided by section 2112 of this title.

28 U.S.C. 2347

Petitions to review; proceedings

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter

are heard in the court of appeals on the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—

(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counter evidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

28 U.S.C. 2348

Representation in proceeding; intervention

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

28 U.S.C. 2349

Jurisdiction of the proceeding

(a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to

review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

(b) The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an

interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application. The hearing on an application for an interlocutory injunction shall be given preference and expedited and shall be heard at the earliest practicable date after the expiration of the notice of hearing on the application. On the final hearing of any proceeding to review any order under this chapter, the same requirements as to precedence and expedition apply.

28 U.S.C. 2350

Review in Supreme Court on certiorari or certification

(a) An order granting or denying interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this title. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

(b) The provisions of section 1254(3) of this title, regarding certification, and of section 2101(f) of this title, regarding stays, also apply to proceedings under this chapter.

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CLERK

NO. 84-1712

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

V.

STATE OF TEXAS, ET AL.

BRIEF OF THE STATE OF TEXAS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of The United States

OCTOBER TERM, 1984

NO. 84-1712

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

V.

STATE OF TEXAS, ET AL.

BRIEF OF THE STATE OF TEXAS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Attorney General of Texas, on behalf of the State of Texas, files this Brief in Opposition to the Petition for Writ of Certiorari of the Interstate Commerce Comission ("I.C.C.").

STATEMENT

The Statement in the Petition for Writ of Certiorari previously filed by the I.C.C., other than a few portions which are clearly argument, accurately states the nature of the case, except for the statement that the State of Texas "was aware of the pendency of" Ex Parte 387, Rail Road Transportation Contracts, 367 I.C.C. 9. As was argued in the Court of Appeals, Texas had no notice that the rate contract rules were to apply to intrastate rail traffic. However, since the notice or lack thereof is not pertinent to a resolution of this case, further discussion is not necessary herein. The Court should also note that some references to citations by Petitioner are those in the petition in No. 84-1515, *I.C.C. ET AL V. TRI-STATE MOTOR TRANSIT CO., ET AL*, which the I.C.C. filed in a companion case and apparently adopts in this case.

REASONS FOR DENIAL OF THE PETITION

The Administrative Orders Review Act of 1950 (Hobbs Act) requires that a petition to directly review an I.C.C. order promulgating a rule must be filed within 60 days of the entry of the reviewable order. 28 U.S.C. §§2321 and 2342(5) (Supp. V 1982). The State of Texas recognizes that the time limitations of the statute for *direct* review of administrative orders are jurisdictional and may not be altered or enlarged by appellate review courts. *See, e.g., Chem-Haulers, Inc. v. United States*, 536 F.2d 610, 613-14 (5th Cir. 1976). The petition before the Court of Appeals however, did not ask that Court for a *direct* review of the I.C.C.'s contract rate rules promulgated November 4, 1982. In contrast, the State of Texas asked the Fifth Circuit to review the I.C.C.'s *application* of federal contract rate rules to the State of Texas' regulation of intrastate rail contract rates.

The D.C. Circuit has recognized that although a reviewing court may not have jurisdiction to review a federal administrative order because the 60-day period has expired, the reviewing court continues to have jurisdiction to review the agency's application of that order in subsequent proceedings. The court in *Functional Music, Inc. v. F.C.C.*, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959) acknowledged reviewing courts' jurisdictional power to review the application of administrative rules and regulations at any time:

> As applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it. For unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.

Although the rules in question in *Functional Music* were promulgated in 1955 and the order implementing the rules was issued

in 1958, this court found jurisdiction to review the 1958 order because the order had an immediate impact on the petitioner. The court found this jurisdiction although the validity of the order was entirely dependent upon the validity of the 1955 rules. *Id.* at 548 n.16.

Similarly, in *Network Project v. F.C.C.*, 511 F.2d 786, 789 n. 1 (D. C. Cir. 1975), the court stated that the policies adopted in a F.C.C. order, in the context of their application in subsequent cases, could be considered by a reviewing court even if the court had no jurisdiction to directly review the order under the Hobbs Act's time restraints. The court in *Network Project* allowed the petitioners to file petitions to deny private companies' applications to operate domestic satellite facilities, although these petitioners had failed to file petitions of review in the original F.C.C. proceeding which established an "open entry" rule in the area of domestic satellite operations.

These cases illustrate the Court of Appeals' jurisdiction to review the I.C.C.'s action in the present case. This proceeding marks the first possible occasion when the State of Texas could have challenged the I.C.C.'s contract rate rules and their application to the State's regulation of intrastate contract rates. This challenge did not "ripen" until this case arose; the I.C.C.'s command to the Railroad Commission of Texas ("R.C.T.") to put rail contracts into effect marked the first instance in which the I.C.C. "informed" the R.C.T. that it must adopt federal contract rate rules. To disallow review of the I.C.C.'s application of its contract rate rules to the R.C.T.'s administration of intrastate contract rates would effectively allow the I.C.C. to (a) promulgate a federal regulation that appears to apply only to federal administrative processes and then (b) magically apply that regulation to State administrative processes after the statutory period for judicial review has passed. This conduct would circumvent any State challenge of the rules either by the submission of comments or direct appeal of the final regulation. That sequence of events would subvert the precepts of administrative rule-making procedure.

The Fifth Circuit properly held that "the Hobbs Act sixty-day limit does not bar later judicial review of the substantive statutory authority for their enactment or of their applicability to a particular situation". (Petition for a Writ of Certiorari, p. 25a). Never-

theless, the I.C.C. asserts that this "procedural-substantive distinction has no support in the case law" citing *Asphalt Roofing Manufacturing Ass'n v. I.C.C.*, 567 F.2d 994, 1005 (D. C. Cir. 1977); *Seacoast Anti-Pollution League v. NRC*, 690 F.2d 1025 (D. C. Cir. 1982); and *Atchison Topeka and Sante Fe Ry. Co. v. I.C.C.*, 687 F.2d 912, 918 (7th Cir. 1982). Without burdening the Court with a detailed explanation of each of these cases, the State of Texas submits that all three deal with out-of-time, broadside attacks on the *wisdom* of a particular regulation. Any statements in those cases to the effect that the Court may not consider assertions that a rule exceeds statutory authority or that it is being misapplied by the agency, are inferential at best.

The I.C.C. also states that there is a conflict between the present cases and authorities of other circuits.[1] However, *none* of these cases deny that the "substantive v. procedural" distinction exists; in fact *Natural Resources Defense Council v. N.R.C.* and *Geller v. F.C.C. expressly acknowledge* such a dichotomy. The principal remains clear that as to *substantive* challenges to a rule, the time limit under the Hobbs Act does not apply. By representations to the contrary, the I.C.C. cannot be heard to place a 60 day "statute of limitations" on its violations of Congressional will or of its own rules. The Fifth Circuit was correct in rejecting these pleas.

Finally, the State of Texas would point out to the Court that the Court of Appeals held in favor of the I.C.C. on each and every point raised by the State below, and that the State, for reasons unrelated to the validity or invalidity of the lower court's decision, has declined to petition this court for writ of certiorari. Although the I.C.C. has cited certain cases[2] wherein a prevailing party has sought and been granted certiorari, none involves the situation herein where the true prevailing party in the Court of

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1. *Natural Resources Defense Council v. N.R.C.*, 666 F.2d 595 (D. C. Cir. 1981); *Geller v. F.C.C.*, 610 F.2d 973 (D. C. Cir. 1979); *New York v. United States*, 568 F.2d 887 (2nd Cir. 1977); *Chem-Haulers, Inc. v. United States, 536 F.2d 610 (5th Cir. 1976)*; *Micro Wave Communications, Inc. v. F.C.C.*, 515 F.2d 385 (D. C. Cir. 1974).

2. *Florida Power & Light Company v. Lorion*, 53 U.S.L.W. 4360 (1985); *Director, OWC v. Perini North River Associates*, 459 U.S. 297 (1983); *Harrison v. P.P.G. Industries, Inc.*, 446 U.S. 578 (1980); *United States v. Nixon*, 418 U.S. 683 (1974); *Menominee Tribe of Indian v. United States*, 391 U.S. 404 (1968).

Appeals sought certiorari alone (not by cross-petition). In short, the I.C.C. is appealing the affirmance of its own order, when it could *not* have appealed its own order to the Fifth Circuit in the first place. The State of Texas would submit that the I.C.C. is seeking an advisory opinion, in which this court should not indulge. *Princeton University v. Schmid*, 445 U.S. 100, 102-103 (1982); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 733-735 (1978).

CONCLUSION

The State of Texas prays that the Petition for Writ of Certiorari be denied.

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No. 84-1712

In the Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA, PETITIONERS

v.

STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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We submit this brief reply to respondent's erroneous assertion (Br. in Opp. 4 (emphasis in orginal)), that "[t]he principal [*sic*] remains clear that as to *substantive* challenges to a rule, the time limit under the Hobbs Act does not apply."

Respondent relies principally (as did the court of appeals) on decisions of the United States Court of Appeals for the District of Columbia Circuit to support the proposed distinction between procedural and substantive challenges to agency rulemaking. A recent decision of the District of Columbia Circuit, however, fully refutes that claim. In *Eagle-Picher Industries, Inc.* v. *EPA*, 759 F.2d 905 (D.C. Cir. 1985), the court held that the expiration of a statutory time period for seeking review of EPA regulations, analogous to the Hobbs Act's 60-day limitation, creates a jurisdictional bar to parties seeking to challenge the substantive

validity of the rules. As in the instant case, the parties in *Eagle-Picher* had not sought direct review of the regulations, but waited to launch their attack until they were parties to a proceeding in which the regulations were applied.[1] See 759 F.2d at 911-915. *Eagle-Picher*, therefore, directly contradicts the Fifth Circuit's jurisdictional holding in this case.

Moreover, *Eagle-Picher* puts into proper context the two cases—*Natural Resources Defense Council* v. *NRC*, 666 F.2d 595 (D.C. Cir. 1981), and *Geller* v. *FCC*, 610 F.2d 973 (D.C. Cir. 1979)—that respondent contends (Br. in Opp. 4 (emphasis omitted)) "expressly acknowledge" a substance/procedure dichotomy. As the court explained in *Eagle-Picher*, the *Geller* case involved a challenge that did not ripen until long after the statutory review period had expired. 759 F.2d at 912. The court emphasized, however, that it had "dismissed all of Geller's claims for lack of timeliness, except one which had clearly just become ripe with the passage of new legislation." *Id.* at 913 (footnote omitted).[2] The *Eagle-Picher* opinion also relied on *Natural Resources Defense Council* in holding that statutory time

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[1] *Eagle-Picher* involved regulations promulgated under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* Section 113(a) of that Act requires challenges to EPA regulations to be made by filing a petition for review within 90 days from the date the rules are promulgated. 42 U.S.C. 9613(a).

[2] In *Geller* the petitioner challenged a 1972 FCC rulemaking order and a subsequent 1976 decision in which the Commission refused to alter the rules. The court noted that Geller's procedural *and substantive* challenges to the agency's 1972 decision were "grossly untimely" and, because the Hobbs Act's 60-day time limit had expired, "we lack jurisdiction to consider so much of Geller's presentation." 610 F.2d at 977 (footnote omitted). The court was therefore restricted to entertaining Geller's challenge "not of the 1972 order promulgating the contested rules, but of the 1976 order refusing to reexamine their continuing validity [in light of recent legislation]." *Id.* at 978 (footnote omitted).

limits are jurisdictional and designed "to protect agencies from endless judicial interference with formalized administrative policy." 759 F.2d at 911 nn. 28 & 29, 913 & n.40 (footnote omitted). Thus, *Eagle-Picher* strips away much of the foundation upon which the lower court's reasoning and respondent's assertions are based. It also underscores the conflict that exists in the courts of appeals on the question presented in this case.[3] The Hobbs Act's jurisdictional limitations are presently a source of considerable confusion[4] and litigation and will continue to be such absent this Court's review.

For the foregoing reasons, and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted. The Court may wish to consolidate this case with *ICC* v. *Tri-State*, No. 84-1515, or to hear the cases in tandem.

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[3]Although *Eagle-Picher* is not itself a Hobbs Act case (see note 1, *supra*), much of the precedent upon which it relies arose under that legislation. And, the principle of finality that prompted the Hobbs Act's 60-day review period is similarly expressed in comparable review limitations contained in other statutes.

[4]Even in the District of Columbia Circuit, *Eagle-Picher* is not the latest pronouncement. Subsequent decisions by other panels suggest that *Eagle-Picher*'s jurisdictional holding is not consistently applied (see *Brotherhood of Locomotive Engineers* v. *ICC*, No. 83-2290 (D.C. Cir. May 3, 1985), slip op. 6-7 (MacKinnon, J., dissenting)), and that the issue is still viewed as unsettled (see *Aluminum Co. of America* v. *ICC*, No. 83-1730 (D.C. Cir. May 10, 1985), slip op. 11).